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COURT OF CRIMINAL APPEALS
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FILED
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

LARRY THOMAS CHAMBERS, JR.
Appellant

vs.

THE STATE OF TEXAS,
Appellee

STATE'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, Appellee, the **STATE OF TEXAS**, by and through the Williamson County District Attorney, the Honorable Shawn W. Dick, and, pursuant to Rules 79.1 and 79.2 of the Texas Rules of Appellate Procedure, files this, its Motion for Rehearing in the above-styled and -numbered cause of action, and in support thereof, would show this Honorable Court as follows:

GROUND RELIED ON FOR REHEARING:

The contested fact issue identified as the basis for an art. 38.23 jury charge instruction in this Honorable Court's opinion was not material to the determination of the lawfulness of a traffic stop because it related to but one of multiple grounds put forth by the State to justify the stop.

ARGUMENT AND AUTHORITIES

As the opinion issued by this Honorable Court notes, a Tex. Code Crim. Pro. Art. 38.23 jury instruction is appropriate when a defendant has met all three of the following requirements: "(1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) that contested fact issue must be material to the lawfulness of the challenged conduct in obtaining the evidence." *Chambers v. State*, No. PD-0424-19, 2022 WL 1021279, at *2 (Tex. Crim. App. Apr. 6, 2022) (*citing Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007)). The challenged conduct in this case, a traffic stop, will be justified if a consideration of the totality of the circumstances reflects that objective, specific, articulable facts existed at the time of the stop to lead the officer to believe that the driver of the vehicle had engaged in criminal activity. *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001) A reviewing court considers the reasonableness of a traffic stop on an objective basis that entails placing itself "in the shoes of the officer at the time of the inception of the stop – considering only the information actually known by or available to the officer at that time." *State v. Duran*, 396 S.W.3d 563, 568-69 (Tex. Crim. App. 2013). Therefore, even if an officer did not subjectively consider a reason for a traffic stop at the moment he initiated his flashing lights, the reviewing court should uphold the stop as long as an objectively reasonable officer would have had reasonable suspicion to make it.

Walter v. State, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000) (declaring "a police officer's subjective motive will never invalidate objectively justifiable behavior under the Fourth Amendment. Subjective intentions play no role in an ordinary, probable-cause Fourth Amendment analysis."); *Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) ("officer's subjective belief is irrelevant to reasonable suspicion, so it does not matter what the trooper actually believed"). Consequently, the basis perceived by an officer in the moment can only be *material* to the legal viability of a traffic stop if a thorough review of the record indicates it is in fact the sole violation an objectively reasonable officer in his shoes at the time would have noted. *Madden*, 242 S.W.3d at 510 (stating "if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence.").

In analyzing the third *Madden* prong, which requires that the contested fact issue be material to the lawfulness of the challenged conduct, the Court's opinion summarily presumed that the primary officer's statement he initiated the traffic stop because he did not see a license plate controlled. *Chambers*, 2022 WL 1021279, at *5. This is likely due to the Appellant's brief erroneously asserting that the "sole basis for the stop" was that the truck driven by Appellant "lacked a rear license plate." Appellant's Brief at 6. However, at the trial of this case the State advanced

multiple theories for which a reasonable officer in this officer's shoes could have initiated a traffic stop: that he reasonably believed the vehicle was not displaying a rear license plate, that he reasonably believed any license plate displayed was not properly illuminated to be clearly legible at a distance of 50 feet, that even if the officer's belief that the vehicle was not displaying a rear license plate was unreasonable the letters and numbers on the license plate were altered or obscured by some other material, and finally that even if the officer's belief that the vehicle was not displaying a rear license plate was unreasonable the license plate in question displayed on its face it's expiration more than seven months prior to the stop. 7 RR 9-11, 21-24, 56, 83, 87, 96-97, 140-43; 8 RR 9-10, 15-16; *see* Tex. Transp. Code §§502.095, 502.407, 504.943, 504.945, 547.322(f). In order to obtain an instruction, a defendant cannot merely challenge some of the factors an officer relied upon, they must challenge all the material facts. *Olsen v. State*, 606 S.W.3d 342, 350 (Tex. App. — Houston [1st Dist.] 2020, no pet.) (no instruction warranted because the defendant "had to do more than raise fact issues as to three probable cause factors: she had to challenge all material facts"); *see also Bendy v. State*, No. 12-21-00073-CR, 2022 WL 869131, at *4 (Tex. App. — Tyler Mar. 23, 2022, no pet. h.) (mem. op., not designated for publication), *Justice v. State*, No. 03-19-00428-CR, 2021 WL 2447067, at *7 (Tex. App. — Austin June 16, 2021, no pet.) (mem. op., not designated for publication), *Burg v. State*, No. 09-16-00200-CR, 2018 WL 1747393,

at *6 (Tex. App. — Beaumont Apr. 11, 2018), (mem. op., not designated for publication) *aff'd*, 592 S.W.3d 444 (Tex. Crim. App. 2020).

While Appellant's counsel upon discretionary review failed to recognize the multiple bases for which a reasonable officer could have initiated a traffic stop, Appellant's trial counsel decidedly did not. His cross-examination both at the suppression hearing outside the presence of the jury and in front of the jury repeatedly referenced the multiple traffic offenses the officer had testified to, discussing the perceived lack of a plate, the lighting of the plate, ability to read the plate from distinct distances and expiration of the plate. 7 RR 34-36, 38, 41, 47, 120-26, 135-36, 145. Then, at the jury charge conference Appellant's trial counsel acknowledged that due to the multiple traffic offenses raised by the officer's testimony he could not craft the exact type of jury instruction suggested in *Madden*. 8 RR 11-15.[1] The instruction submitted did not call upon the jury to decide on a

[1] 8 RR 11, 14-15 (Appellant's trial counsel arguing "These issues usually come up when we're talking about there being a conflict in facts for juries, come up in issues- - like in this particular case, one of the issues that came up on Madden v. State, is that the officer said that he made a stop because he said the defendant was speeding. The defendant got on the stand and testified that he wasn't speeding. The Court held that it was perfectly legitimate for the Court to submit a special issue on that issue because that issue was - - was contravening in the trial. Also in Madden, you'll see that later during the detention phase of this case - - it's a drug case - - the defense lawyer asked for another jury charge regarding the detention, specifically because the officer said that defendant was nervous, and the lawyer tried to say that the videotape didn't show that. And they specifically say in the statute that just what the videotape shows about nervousness or not wouldn't cause the judge to have to give the charge. So in that kind of case, they said it's improper for the court not [sic] to give a charge… I think that it's altogether proper for the Court to instruct the jury on lawful stops. And basically if you'll look at the outline of the way this - - the proposed charge reads, it says that basically there are a number of reasons that an officer can stop a person… and any of those things can still be something that the officer can make the stop. But I do think that the

single genuine issue of material fact, but rather substitute its legal analysis as to reasonable suspicion under the totality of the circumstances set out above for the analysis the trial court had already performed at the suppression hearing outside the presence of the jury. CR 117-18.[2]

The opinion issued by this Honorable Court references similarities between the facts of this case and those in *Madden*. *Chambers*, 2022 WL 1021279, at *4 (stating "These facts are similar to the situation in *Madden*."). However, the commonalities noted in the opinion do not address the full extent of the parallels. In fact, the instruction requested by trial counsel in this case bears more similarity to the second instruction requested in *Madden*, relating to the reasonable suspicion to extend the length of the detention, which this Honorable Court found inappropriate and unnecessary. CR 117-18; *Madden*, 242 S.W.3d at 511-13. In that case, as in this one, the trial court had held a motion to suppress hearing outside the presence

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evidence raises the issue of whether or not the stop is legitimate, and I don't think the charge proposed does harm, and I think it is a material issue to whether or not this is a legitimate stop.").

[2] CR 117-18. (Appellant's proposed instruction charging: "…if you find from the evidence that on the occasion in question Sgt. Sam Connell, did not have a reasonable suspicion to believe that the defendant, Larry Thomas Chambers, Jr., was operating a motor vehicle while not displaying a license plate, or was operating a motor vehicle with a license plate that had other material distorting angular visibility or detectability, or was operating a motor vehicle with a license plate that had other material altering or obscuring the letters or numbers of the license plate number or was operating a motor vehicle with a license plate that was not illuminated by a white tail lamp or separate lamp that made the plate clearly legible at a distance of 50 feet from the rear, then you will not consider such evidence or any purpose whatsoever, and disregard any evidence obtained as a result of that search.").

of the jury and made legal rulings. 7 RR 8-63; *Madden*, 242 S.W.3d at 516. In that case, as in this one, the dashboard camera video presented was of poor quality and "does not show much of anything with clarity." *Chambers*, 2022 WL 1021279, at *4; *Id*. at 515. Most importantly, in that case as in this one, the State advanced multiple legal theories to justify the challenged action and the trial court made its review of the available evidence and the credibility of the officer leading to the conclusion that what she had seen and heard did not raise a *material* contested issue. 8 RR 16; *Madden*, 242 S.W.3d at 516. Yet in *Madden* this Honorable Court was satisfied to defer to the trial court's assessment of the totality of the circumstances, and in this case it held that "the trial court clearly acted within its discretion and authority to deny the motion to suppress, but Appellant was entitled to have the jury consider the lawfulness of the stop under Article 38.23." *Madden*, 242 S.W.3d at 516; *Chambers*, 2022 WL 1021279, at *4.

It appears that the explanation for this variance lies in this Honorable Court's recognition that the trial court in *Madden* had multiple grounds on which to base its finding of reasonable suspicion to extend the detention, but failing to recognize the other grounds for a traffic stop in the case at bar – thus believing this case to be more analogous to *Madden*'s traffic stop (requiring an instruction) than its extended detention (no instruction appropriate). *Madden*, 242 S.W.3d at 508-09, 517-18; *Chambers*, 2022 WL 1021279, at *4-5; see also *Rocha v. State*, No. 03-07-00579-

CR, 2009 WL 1364347, at *5 (Tex. App. — Austin May 12, 2009, no pet.) (mem. op., not designated for publication) (finding that disputed Romberg field sobriety test was not material to the ultimate finding of probable cause to arrest for DWI where there were multiple other signs of intoxication). However, reasonable suspicion for a traffic stop may be too complex a legal determination for a jury to "wrestle with" that "would require a lengthy course on Fourth Amendment law" just as reasonable suspicion to extend a detention may be. *Madden*, 242 S.W.3d at 511-13 (stating "the jury cannot 'wrestle with' the legal determination of whether certain facts do or do not constitute 'reasonable suspicion.'); *Duran*, 396 S.W.3d at 568-69 ("An officer must have reasonable suspicion that some crime was, or is about to be, committed before he may make a traffic stop. Critical to that reasonable-suspicion analysis is whether the stop is supported by "specific and articulable facts" at its very inception… The court then asks, '[W]ould the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate.'"). *Madden* held that the trooper in that case had advanced ample grounds to justify extending the traffic stop until the K-9 arrived when he noted inconsistent answers between those detained about their travel and a less than forthcoming response to a question about his criminal history, whether or not the finder of fact found credible what the Trooper perceived as nervousness from fumbling his wallet and trembling in his hands. *Madden* 242 S.W.3d at 506-07, 516-

17, fn. 30. In the instant case, the trial court had heard testimony and reviewed evidence regarding the stop of Appellant's vehicle, including the officer's belief that the vehicle was not displaying a license plate, that any license plate it did display was not properly illuminated to be readable at a distance of 50 feet, that it had some substance obscuring it to make it not readable from 50 feet and that upon discovery it was on its face expired. 7 RR 9-11, 21-24, 56, 83, 87, 96-97, 140-43; 8 RR 9-10, 15-16. In *Madden*, this Honorable Court held it is the "trial judge who decides what quality and quantum of facts are necessary to establish 'reasonable suspicion.'" *Madden* 242 S.W.3d at 511.While this Honorable Court has noted a contested issue of fact in regards to the officer's reasonable belief that Appellant's vehicle lacked a front license plate, there was no affirmatively contested issue of material fact in regards to the proper illumination of Appellant's license plate. *Chambers*, 2022 WL 1021279, at *4-5; 7 RR 120-26 (the officer testifying under repeated cross-examination questions that he didn't see a light or recall seeing a light). As this Honorable Court emphasized in *Madden*, cross-examination questions on their own cannot raise a disputed issue only the answers and any admitted evidence. *Madden*, 242 S.W.3d at 514-15 (finding no affirmative dispute unless the witness says "yes, that's true" a mere lack of recollection does not suffice). The officer in this case never agreed that a light was illuminating the license plate to make it visible from 50 feet, and the trial court having heard the testimony and reviewed the evidence

was within its discretion to find no such affirmative contest existed. 7 RR 120-26, 34-36, 38. Having heard the testimony at both the motion to suppress and in front of the jury, reviewed the poor quality dash camera footage and still photographs, and assessed the officer's credibility, the trial court was well within its discretion to determine that there was not a contested factual issue upon which the determination of reasonable suspicion relied.

Further, Appellant's trial counsel conceded in this case that the license plate ultimately discovered on Appellant's vehicle after it stopped was tattered, worn, difficult to read and expired. 7 RR 145, 8 RR 11-13. Reasonable suspicion must be determined based on facts known to an objectively reasonable officer in the shoes of the officer who made the stop. *Duran*, 396 S.W.3d at 568-69. Yet here what facts an objectively reasonable officer in this officer's shoes would have known bears consideration: a finding that the officer's belief there was no plate or no properly illuminated plate capable of being read at a distance of 50 feet was *unreasonable* would mean that the objectively *reasonable* officer would have seen that plate. That officer would have had to see that it bore substances or ink smudges on it that obscured its legibility and that on its face it stated it was expired and initiated a traffic stop. Thus, reasonable suspicion existed in the objectively reasonable officer's eyes from one ground or another and "the trial judge did not err in declining to submit

any jury instruction on the immaterial fact, much less the instruction on a legal conclusion that appellant requested." *Madden*, 242 S.W.3d at 518.

PRAYER

For the foregoing reasons, the State of Texas prays that this Honorable Court grant the State's Motion for Rehearing and reconsider its opinion.

Respectfully Submitted:
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CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of this State's Motion for Rehearing by email or e-filing to Appellant's counsel Keith Hampton at keithshampton@gmail.com.

DATE: April 19, 2022

/S/ ANDREW ERWIN

ANDREW ERWIN

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